162 US 613

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

No. 884.

GEORGE W. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED FEBRUARY 4, 1896.

(16174.)

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INDEX.

	Original.	Print.
Caption	a	1
Indictment	1	1
Arraignment and plea	3	2
Order granting motion for witnesses at public expense	3	2
Order overruling motion for continuance	3	3
Order beginning trial	4	3
Order continuing trial	4	3
Order concluding trial	5	4
Verdict	6	4
Judgment and sentence	6	4
Order allowing bill of exceptions, etc	7	5
Order for stay of execution	7	5
Bill of exceptions	8	6
Statement of evidence for the Government	8	6
Testimony of J. B. George	9	6
D. C. Edmons	13	9
Statement of defendant before United States commissioner	13	9
Statement of further evidence	21	16
Statement of evidence for defendant	24	18
Charge	24	18
Exceptions to charge	30	23
Judge's certificate	30	23
Assignment of errors	31	24
Petition for writ of error	35	27
Affidavit of poverty	36	28
Writ of error	37	28
Citation	38	29
Clerk's certificate	39	29

a In the circuit court of the United States, western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of United States vs. George W. Wilson, indictment for murder, No.

1 INDICTMENT.

United States of America, western district of Arkansas.—In the circuit court, Aug. term, A. D. 1895.

UNITED STATES
vs.
GEORGE W. WILSON. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That George W. Wilson, a white man and not an Indian, on the 15th day of May, A. D. 1895, at the Creek Nation, in the Indian country within the western district of Arkansas aforesaid, with force and arms in and upon the body of one Zachary W. Thatch, a white man and not an Indian, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said George W. Wilson with a certain blunt instrument, a more particular description of said blunt instrument being to the said grand jurors unknown, which said blunt instrument he, the said George W. Wilson, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did strike, bruise, and beat to against and upon the said Zachary W. Thatch, and that the said George W. Wilson, with the blunt instrument aforesaid, then and there by force of the striking, bruising, and beating aforesaid by the said George W. Wilson then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound him, the said Zachary W. Thatch, in and upon the head of him, the said Zachary W. Thatch, giving to him, the said Zachary W. Thatch, then and there with the blunt instrument so as aforesaid used and wielded by the said George W. Wilson in and upon the head of him, the said Zachary W. Thatch, one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound he, the said Zachary W. Thatch, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said George W. Wilson, him the said Zachary W. Thatch, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute
2 in such case made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

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2nd count.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That George W. Wilson, a white man and not an Indian, on the 15th day of May, A. D. 1895, at the Creek Nation in the Indian country, within the western district of Arkansas aforesaid, wickedly contriving and intending one Zachary W. Thatch, a white man and not an Indian, then and there being in a manner and by means to the said grand jurors unknown, wilfully, feloniously, and of his malice aforethought to kill and murder with force and arms within the district aforesaid and at the time aforesaid, feloniously, wilfully, and of his malice aforethought, in a manner and by means to the said grand jurors unknown, did the said Zachary W. Thatch then and there kill and murder, and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said George W. Wilson him the said Zachary W. Thatch, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 159, United States vs. George W. Wilson. Murder. A true bill, E. J. Black, foreman. Witnesses, P. W. H. Thatch, Jno. Butter, Charles Acton, S. D. Denison, Will Chisholm, Renfroe Butter, C. H. Paul, D. C. Edmonds, J. P. Liddie, J. C. King, Wm. Dale, John Hanning, Sam Hall, W. T. Paul, Tom Hurley, John Crotzin, Mary Chisholm, Mollie Bergo, W. L. Causey, Tom Johnson, Lily Adams, Wm. Stanley, Jeff King, J. S. See, T. F. Butter, Wm. Butter, B. A. Butter, Jno. Andrews, J. M. Davis, Jno. Butter, Keokuk Falls, I. T.; Minerva Rose, R. S. Todhunter, Springdale, Ark.; Minerva Thatch, Fayetteville, Ark.; John P. Jones, Sam Lorge, Shawnee; Charlie Fox, Bob Mobley, J. B. George, Tecumseh, I. T.; Sue Hale, Goshen, Ark.; Allen Morris, Muskogee, I. T.; Wm. Stanley, Webbers Falls, I. T.; G. C. Clark, Jno. Adams, Fort Smith, Ark. Filed in open court Aug. 28, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

3 In the circuit court of the United States for the western district of Arkansas—Aug. term, 1895, Wednesday morning 8½ o'clock, Aug. 28, 1895.

Court met pursuant to adjournment. Present, the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES vs. GEORGE W. WILSON. } Indictment for murder, No. 159.

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defend-

ant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

FRIDAY, *Nov. 1, 189*

(Caption omitted.)

On this day come the said defendant by his attorney and files his application verified upon oath praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of W. J. Wombles, Jack Wilkey, Thos. Whinnery, Mart Whinnery, Allen Morris, S. H. Sparks, Mark Hyatt, Lot Heaton, W. R. Montgomery, James Heaton, Ben Porter, Maria F. Carr, Phillip Barner, Gus Brewer, and Jo Clark, in behalf of said defendant be paid by the United States and that a subpœna be issued for them returnable Nov. 18, 1895.

MONDAY, *Dec. 16, 1895.*

(Caption omitted.)

On this day come the said defendant by his attorney and files his motion for a continuance in this cause. Said motion coming on for hearing the court, being fully advised in the premises, doth overrule said motion to which ruling of the court counsel for the defendant at the time excepted.

4 MONDAY, *Dec. 16, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and T. M. Gunter, esq., assisting, and come the said defendant in custody of the marshal, and by his attorney, C. J. Frederick, esq.; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit: Jas. H. Curnutt, Wm. C. Grimes, Sidney H. Howell, Wm. Harper, Frank Johnson, Dennis Lee, Pleas L. Bohlen, James Cooper, John T. Griffin, John D. McClary, John Penix, Bass A. Rogers, twelve good and qualified electors of the western district of Arkansas, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this

court; and it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

TUESDAY, *Dec. 17, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorney, C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of
5 this cause, in charge of a sworn bailiff of this court, to wit:

Jas. H. Curnutt, Wm. C. Grimes, Sidney H. Howell, Wm. Harper, Frank Johnson, Dennis Lee, Pleas L. Bohlen, James Cooper, John T. Griffin, John D. McClary, John Penix, Bass A. Rogers, who took their seats in the jury box, and after hearing the remainder of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause they were put in charge of the sworn bailiff aforesaid.

WEDNESDAY, *Dec. 18, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorney, C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of this cause, to wit (in charge of a sworn bailiff of this court):

Jas. H. Curnutt, Wm. C. Grimes, Sidney H. Howell, Wm. Harper, Frank Johnson, Dennis Lee, Pleas L. Bohlen, James Cooper, John T. Griffin, John D. McClary, John Penix, Bass A. Rogers, who took their seats in the jury box, and after hearing the remainder of the argument of counsel and receiving the charge of the court, to which said charge counsel for the defendant filed exceptions, said jury retired, in charge of the sworn bailiff aforesaid, to consider of their verdict.

THURSDAY, *Dec. 19, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorney, C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

Jas. H. Curnutt, Wm. C. Grimes, Sidney H. Howell, Wm. Harper, Frank Johnson, Dennis Lee, Pleas L. Bohlen, James Cooper, John T. Griffin, John D. McClary, John Penix, Bass A. Rogers, who returned into court the following verdict, to wit:

6 "We, the jury, find the defendant, George W. Wilson, guilty of murder as charged in the first count of the within indictment."

(Signed) DENNIS LEE, *Foreman.*

Whereupon, by order of the court, the jury was discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence.

FRIDAY, *Dec. 20, 1895.*

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, George W. Wilson, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the court upon the verdict of guilty heretofore returned against him by the jury in this cause on the 19th day of Dec., 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said George W. Wilson be deemed, taken, and adjudged guilty of the crime of murder for wilfully and of his malice aforethought killing Zachary W. Thatch, in the Indian country, and it is ordered by the court that the said marshal of the district aforesaid cause the said George W. Wilson to be taken hence and him, the said George W. Wilson, safely and securely keep from the date hereof until Thursday, the 30th day of January, A.D. 1896, and on that day and between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of said day, the said marshal cause the said George W. Wilson to be taken to some convenient place within this district to be appointed by said marshal and then and there, between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon on Thursday, the said 30th day of January, in the year of our Lord one thousand eight hundred and ninety-six, cause the said George W. Wilson to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this
7 prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

FRIDAY, *Jan. 24, 1896.*

(Caption omitted.)

Comes the defendant by his attorney, C. J. Frederick, esq., and tenders his bill of exceptions and asks that the same be signed and made a part of the record in this case, which is accordingly done.

Defendant also files his assignment of errors and a petition for writ of error to the Supreme Court of the United States; also at the same time files a poverty affidavit, praying for an appeal in this cause at the expense of the United States.

WEDNESDAY, *Jan. 29th, 1896.*

(Caption omitted.)

Comes the clerk and makes known to the court that a writ of error taking this case to the Supreme Court of the United States has been issued.

It is therefore ordered that execution of sentence be stayed pending action of said Supreme Court.

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
GEORGE W. WILSON.

Be it remembered that on this the 15th day of Dec., 1895, came on to be tried the above-stated cause.

Whereupon the United States, represented by the United States district attorney, to maintain the issues on their part offered evidence tending to prove that Zachary W. Thatch, the person alleged to have been killed by the defendant, was dead; that his body was found in a creek, in a decomposed state, in the month of May, 1895. Several witnesses testified that from the clothing they thought it was the body of Thatch, who had been camped near the place with the defendant. They thought the body had been dead about two weeks. The defendant was arrested the day this dead body was found. He was camped within a quarter of a mile of where the body was found. He was carried to the dead body after dark, and by a lamplight saw it and said it looked like the body of Thatch. The defendant when arrested had in his possession five horses, wagon, gun, bedclothing, and other property that had belonged to Thatch. The bedclothing was bloody. The blood had passed through parts of the bed, and the bloody parts were a foot or more in diameter. Near where the body was found, defendant and Thatch had camped about two weeks before. At this camping place was found the charred pieces of cloth and some buttons and some blood in ground under where there had been fire. The defendant told the people when arrested that his partner, Thatch, had gone away riding one of his horses, intending to go to the Kickapoo opening, and at another time he said to Shawnee to buy town lots; that he left about two weeks before this body was found, and that he heard nothing from him since he left. To others he said he had received a letter from Thatch, but produced no such letter, and denied having said that.

9 The United States, to further maintain the issues on their part, offered to read in evidence written statement purporting to have been made before J. B. George by the defendant, but the defendant objected to the reading of the written statement on the ground that it was not voluntary, whereupon J. B. George was introduced and examined by the United States and testified as follows:

Your name is J. B. George?

Yes, sir.

Where do you live?

Shawnee, Ok.

Do you hold any official position?

Yes, sir; United States commissioner for the Third judicial district.

Were you the commissioner who examined the defendant, Wilson, up there?

I was.

I will ask you to look at this paper I now hand you, and see if this is his statement as made and written down at the time?

Yes, sir; this is his statement; I have examined it before.

Cross-examination:

Was the defendant present when you examined the witnesses?

No, sir.

Where was he?

He was in the jail.

You examined the witnesses in his absence, then?

Yes, sir. He was examined the day before I examined the witnesses.

He was?

Yes, sir.

You examined a defendant first up there in that country, and then take the witnesses while he is in jail and take their testimony, do you?

No, sir. There was some talk of mobbing, and it is a small town, and I knew it was an examining court.

What town was it?

Keokuk Falls.

You lived at Keokuk Falls at that time, did you?

Yes, sir.

You have since that time moved to Shawnee?

Yes, sir; on the fifth of July last.

Is that the custom in that country, to examine the witnesses in the absence of the defendant?

No, sir; I don't know that it is.

DIST. ATTY. It is the French system.

Mr. C. J. FREDERICK (counsel for defendant). It is not the American system. (To the witness:)

That is the French system you have adopted up there?

I never lived in France or read French history, and I could not tell you whether it is or not.

How came you to examine the witnesses after you did the defendant?

I read him the charges and went on and examined him, and he answered these questions.

That is the way you did it?

Yes, sir.

You read the charge against him, that of murder, then you went on and asked him these questions and he gave you these answers?

Yes, sir.

Was he represented by any attorney?

He was not. There was no attorney there.

You asked the questions and wrote the answers.

I had them taken down there in my presence.

Did you write them?

No, sir.

Did you read them over to him after they were written down?

I did not as I remember of. I would not say positively; I don't think I did. I certified to them there.

You didn't read them over to him for correction?

No, sir; not that I remember of.

The ASSISTANT DIST. ATTORNEY. Who wrote them?

Mr. Dave Emmons, a good deal of the time. Mr. Dave Emmons wrote part of them, I think, and a man named Perry, his brother-in-law, wrote the other portion of them. They were written in different handwriting.

Mr. C. J. FREDERICK (counsel for defendant). Did you swear the defendant?

No, sir; it was just his statement of the case.

Did you ask his permission as to whether or not you should examine him or not?

I did not.

You just went to work and examined him?

He just went on and voluntarily made that statement.

You volunteered to ask him, and he just answered?

I asked him those questions and he went on and answered them.

11 Did you tell him that he had a right to answer or not, as he chose?

I did not.

You didn't advise him as to his rights?

I did not.

Did you tell him he had a right to be represented by counsel if he chose?

I did not.

You didn't tell him anything of the sort? Was he handcuffed at that time?

He was not.

Who was present when you made that examination?

There was half a dozen or dozen. There was a dozen, I guess; a dozen or more. Mr. King was there present.

Did the dozen comprise some of the witnesses who were there? They heard his statement did they?

Yes, sir.

You didn't put the witnesses under the rule?

No, sir; I did not.

The talk of mobbing was before or after he was examined?

It was before I examined him. He was brought up to my office about 8 o'clock Sunday night, and there was a crowd at the door talking, and I was sick with headache and was in bed, and I got up and walked to the door, and they had a man there that they thought was the man that killed that man whose body was found in Rock Creek, and they wanted to know what to do with him, and I told them to take him and turn him over to the city marshal and for him to put him in jail, which was done.

Did you examine him before you put him in jail.

No, sir.

It was the next day you examined him?

Yes, sir.

You examined him after it had been talked about mobbing him?

I heard some talk around there that he ought to be hung; something of the kind; didn't see any——

Didn't you tell him that you thought the rope was about ready for him?

I don't remember that I did.

Or words to that effect?

I do not think I did.

You do not deny that?

No, sir; I told him this: I told him that I thought that was his guilt on those bedclothes and on that ax.

Did you tell him that before he made his statement to you?

12 No, sir; that was the winding up of the statement.

Then what day was it you called the witnesses to testify?

It was the next day, the 28th.

The next day you called the witnesses to testify?

Yes, sir; and I will tell you why; we got through the examination of Wilson about 3 or 4 in the evening. I had a coffin made and got it fixed and sent out to have his body buried, but for some reason or other they did not bury it; so at the time we got through taking down his statement they requested that I adjourn court to allow them to go out and bury that body, which I did.

Was that in the presence of this defendant?

Yes, sir.

Now, then, you didn't tell the defendant or warn him as to whether or not he had a right to answer the question or not; you didn't tell him that he had a right to be represented by counsel?

No, sir.

You did not ask him any questions of that sort at all?

And then after the examination of him they had been threatening to mob him. I said that I heard one or two say that he ought to have been mobbed. I do not know that was the public talk.

And the reason you did not call him out when the other witnesses were examined was because of fear that he would be mobbed?

Yes, sir; that was one reason.

That is the reason you gave awhile ago.

That was one of the reasons. It is not the only one.

The ASSISTANT DIST. ATTORNEY. The Edmons you refer to is the Edmons here?

The WITNESS. Yes, sir.

Mr. C. J. FREDERICK (counsel for defendant). I do not think that your paper is competent.

The ASSISTANT DIST. ATTORNEY (to the witness). His statement was made freely and voluntarily?

The WITNESS. Yes, sir. I stated the charge to him and went on and asked him these questions and he answered them; and that is what is done. He went on and made these replies to my questions.

13 D. C. EDMONS, having been duly sworn and examined upon behalf of the Government, was recalled in rebuttal, examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Q. Your name is D. C. Edmons?

Yes, sir.

Were you in Commissioner George's court when Wilson, the defendant here, made his statement?

Yes, sir.

Did you write down any part of it?

I don't know if I did.

You can look at it and see if any of it is in your handwriting.

(Witness examine' papers.) Yes, sir.

You wrote from that on, did you [referrring to a certain part of the statement of the defendant]? Did you find you wrote some of it?
Yes, sir.
That which you wrote, did you write it down as he stated it?
Yes, sir.
Did you write his answer correctly there?
Yes, sir.

The United States, by the district attorney, then again offered to read in evidence the paper purporting to be the statement of defendant made to J. B. George, but the defendant objected, and his objections were by the court overruled, and the defendant at the time excepted. The paper was then read in evidence to the jury, which is in words and figures as follows:

Statement taken before Jno. B. George, U. S. commissioner of the third district of Oklohoma Territory, whose office is situated in Keokuk Falls, O. T.

What is your name?
A. Wilson.
What is your first name?
A. G. W. Wilson.
How old are you?
Twenty-four last Nov.
Where were you born and raised?
I was born in middle Tenn., at Murphrysborough, and moved from there to Obion County, Tenn.
Then where di' you move to?
I moved to White County, Ark., and remained there about six months; from there to Benton County, Ark. I lived there about four years and a half.
Where did you move to from there?
14 I moved to Eureka Springs, Carroll County, Ark.
Where did you move to from Carroll County, Ark.?
I moved to Washington County.
Where did you move to from Washington County?
I moved from there into Oklahoma Territory.
Are you a married man?
I am not.
Is your father and mother living?
Yes, sir.
Where do they reside?
When I left they lived in Washington County, near Siloam Springs, Ark.
When did you last see them?
About the 25th of March, 1895.
Who came from Ark. into this country with you?
A man by the name of Thatch and a Dr. and son whose names I have forgotten.
What was Thatch's first name?
Zach W. Thatch.

Where did he live in Arkansas?
He lived near Springdale, Ark.
Was he a relative of yours?
He was said to be.
How long had you known Thatch?
Off and on for eight years with him.
Were you ever in his employment?
I was not.
What near of kin was he said to be to you?
He was said to be my uncle.
On your father or mother's side?
On my mother's side.
Did he live near your father or mother in Ark.?
No, sir; it was about 25 miles.
What employment was Z. W. Thatcher in in Ark.?
He was a farmer.
Did he own the farm?
He lived upon a farm and the farm, was disposed of.
About what time was the farm disposed of?
Within the past six months, I think.
Was it this year?
I can't say as to that.
For what purpose did you and Thatch leave Arkansas together?
For the purpose of buying a claim in the Sac & Fox country, Oklohoma Territory.
When did you and Thatch first arrive in the Sac & Fox country, O. T.?
I think about 25 days ago.
Where did you first stop after you arrived in Oklohoma Territory?
I arrived at Sac & Fox Agency, O. T.
What day of the month was it that you arrived at the Sac & Fox Agency?
About the second of May, 1895.
How long did you stay in the Sac & Fox Agency?
Just long enough to noon.
Where did you go to from the agency?
We went from there to Shawnee, O. T.
How long did you remain at Shawnee, O. T.?
One night and a half a day.
Where did you go from Shawnee?
I think it was a place by the name of Tum, about 6 miles from Shawnee, O. T.
How long did you remain there?
We remained there about three days.
Where did you go to from there?
We went from there to the Seminole Nation.
How long did you remain in the Seminole Nation?
We stayed there about 6 days.
What was you doing in the Seminole Nation?
We done nothing.
Where did you go from the Seminole Nation?
We went to a big spring two miles east of Keokuk Falls, O. T.

How long did you remain there?
I think probably two days and one night.
From there where did you go?
To Mr. Bargo's.
From there where did you go?
We got to Mr. Chisholm's Monday evening about two hours by sun.
Did you remain there that night?
Yes; near his house.
What did you both do the next day?
Well, I went up to this man Chisholm's house next morning and called him out and told him that I wanted to look around the country, and would like to leave my wagon and team near the house until I came back.
What did you do when you left your wagon and team at Chisholm's house?
I went down in the field where Chisholm's was, and remained until about noon.
What did you do then?
I got some onions and went up near to the house and cooked
16 my dinner. After I got dinner I went back down into the field where Chisholm was plowing, and remained around his premises during the entire day.
Then what did you do?
I went to bed in the wagon, near Chisholm's house.
What did you have in that wagon?
I had some gears and chains, wheat, bran, and clothes.
Did you have any be'clothes in the wagon?
I had four sacks of straw, and four or six pieces of quilts, and various little things, such as hammer, nails, etc.
What do you mean by and so forth?
I mean saws, punches, and cooking vessels.
You have named everything that you had in that wagon that you spoke of the above said night?
I have named everything except some little inferior articles.
What did you do the next day after the night mentioned?
I went up to Mr. Butler's.
Then what did you do?
I talked with him about fifteen minutes and then went back down to Mr. Chisholm.
Then what did you do?
Remained around Mr. Chisholm; I remained around there five or six days doing nothing.
Then what did you do?
About the above time made arrangements with Mr. Chisholm to take a lease of him.
Did you take a lease of Mr. Chisholm?
Yes; verbally.
Did you pay him any money on that lease?
No, sir; did not.
Had you gone into any written agreement?
No, sir; not any.

What kind of verbal lease did you have with Mr. Chisholm in regard to the lease?

I was to stay there two years and live at Mr. Chisholm's house, and cultivate together, and we were to divide crops.

Did you ever farm?

Yes, sir; I have.

Did you and Thatcher have two teams?

Yes; had two teams.

What became of Thatcher and his team?

I have one of his horses, taking care of it, and the next morning about half hour by sun he saddled his horse and left to go to Shawnee, O. T.

17 From that time since you have never seen him?

No, unless I saw him last night.

How was he dressed when you saw him last?

From best I can remember he had on dark coat and vest, pair of brogan shoes, blue overalls. Can't state the color of his shirt.

What was in his wagon?

He had no wagon. We had two teams but had no wagon.

Does that wagon belong to you?

Yes, it does.

Where did you get that wagon?

I bought it in Washington Co., Ark.

From what man did you buy it?

From a man by the name of Cook.

Near what place does Cook reside?

He lives near Fayetteville, Ark.

Was it a new or old wagon when you purchased it?

It was a nearly new wagon. Cook *bot* (bought) it from an uncle of mine.

What was your uncle's name?

Willis Thatch.

Where does Willis Thatch reside?

In the Cherokee Nation.

Near what town?

Near Prior Creek P. O.

Where did you buy your team of horses?

I *bot* (bought) one of them, and my people gave me the other.

From whom did you buy the one you speak of?

I *bot* (bought) that sorrel mare from a man named Jones.

Who of you people have the other one?

My father.

Did you own everything that was in the wagon?

I did not.

What was in the wagon that did not belong to you?

Lap rugs, ropes, singletrees, two hammocks, one axe, and two or three pieces of quilts, and two or three meal sacks, about 8 pounds of tobacco, and some clothing.

To whom did the above property belong?

To my uncle, Z. W. Thatch.

Where is the above-described property now?

At Mr. Chisholm's, where I left it.
Where was it at Mr. Chisholm's when you last saw it?
In my wagon, near Mr. Chisholm's house.
What was in that wagon belonging to Mr. Thatcher when you last saw it?
Everything above mentioned.
18 What was in that trunk of yours belonging to Mr. Thatch?
He has some wearing clothes in there, a cigar box, and in that there is buttons, needles, thread, a certified deposit from the bank of $25.00.
Does that trunk belong to you individually?
It does.
Did Mr. Thatch have a trunk along?
No.
How many of these horses belonged to Mr. Thatch at the time he left?
Two.
You say you have one of the horses now?
Yes.
What become of the other one?
He rode it of' (off).
Describe the horse he rode off.
He was a dark bay horse 8 years old, no marks or brands, about fifteen hands high.
Did you have an axe belonging to you?
Yes.
Describe that axe.
I had two axes and he had one.
Have you those two axes now?
They are at Mr. Chism's, or left there.
What become of the axe owned by Mr. Thatch?
It is at Mr. Chism's.
Is there any mark of any kind upon that axe?
I can't say as to his, or to mine either, except as to one; if I remember right one has been upset, and either at the upper or lower part of the eye there is a split in it runs down the blade.
Is there any blurs or stains of any kind on either of those axes?
None that I know of.
How many horses did you both have when you come to this Territory?
7 head, including the colt.
What has become of the other two horses and the colt?
I have five head of horses and the colt in my possession now.
Did Mr. Thatch have a bedtick?
No, sir.
What kind of bedclothes did he have?
He had a sheet and piece of quilts.
Describe the quilts.
I can't.
Are they clean or dirty?
Dirty.
Did you have a bedtick?
I have.

What was in that bedtick?

Straw.

What caused it to be dirty?

General use in traveling through the country.

19 Would you recognize that bedtick if you saw it now?

Yes.

Is there any peculiar' about bedtick that you know it by?

It was too wide for the wagon bed of the man I got it of, and I think it was stitched up on one side, so as to turn under, with one or two patches on it.

From whom did you buy that bedtick?

I bot (bought) that bedtick from a man by the name of Newsome, who came by Chisholm's house with a drove of cattle about ten days ago.

Where is this man Newsome now?

I do not know. When he came to Chisholm's house with the cattle, myself and Miss Chisholm went out to the fence and we both noticed that he acted very peculiar, so much so that we all talked about it. He asked to see the horse that belonged to my partner at Shawnee. I went down and showed him the horse, and he seemed to know the horse as well as I did; also to know about the horse before he came, by the way he acted after he came. He had woman and boy with him, and asked me how I would trade the horse. I told him that the horse did not belong to me, but that I had a right to trade him.

How was this man Newsome and his wife and boy travelling?

In a wagon; all but man on horseback.

How many head of cattle did Newsom have?

He claimed to have forty-five.

What kind of cattle did they consist of?

With the exception of two or three old yoke of steers they were principally 2 or 3 yr. old.

What kind of looking man was Newsom?

He was a man about 5 ft. 10 in. high; about forty-four year' old; light complected.

Did he have whiskers or moustache?

He had light moustache and very little whiskers.

What direction did Newsom and family go after he left Chisholm's?

He claimed that he wanted to go to Okla. Ter., but did not want to come th through Keokuk Falls.

Did Mr. Thatch have any money?

Yes, sir.

How much money did he have?

I don't think he had over $15.00.

How much money did you have when you came into the Ter.?

About $30.00 or $35.00.

20 Have you ever made any demonstrations to find out or hear what has become of Mr. Thatch?

I can't say that I have. He was to have been back on Saturday, after leaving Tuesday, about May 14th, 1895. The day before he should have been back, just a few days before the opening of the Kickapoo, or about the 20th, there was a man come through there and stopped and camped

on the creek, and he told me that he was from Shawnee, and about the people that was camped there to make the race, and he also said that he had been directed there by a man that he did not remember his name, to get water. He also described this man, as he didn't know his name, and the description, with the exception of the age, suited for my uncle, as he said he had been directed there as a watering place, and him giving me the statement that he had from the man who directed him there, I felt assured that it was my uncle.

How old was this man that you have mentioned?

About 25 years old.

What kind of looking man was he?

He was a man about 6 ft. tall, and claimed to be a cattle dealer.

Did he have a moustache?

He had short moustache and chin whiskers.

Was he alone?

He was.

How was he travelling?

In a wagon.

Did anyone else see him there but you?

No, sir; I think not.

Has Mr. Thatch been there since the 10th of May, 1895?

No, sir.

Did you and him intend to go to Okmulgee?

We didn't know as we did.

Had you and Mr. Thatch intended to go to Okmulgee?

No, sir.

Did you ever direct the P. M. here to forward your mail and Thatch's mail to Okmulgee?

No, sir; I came here and called for mail.

Was Thatch ever in this town to your knowledge?

Yes, sir.

When was the last time that he was ever in this town?

He was here May 13, 1895, and also wrote an order for mine.

Did you ever authorize Thatch to have your mail forwarded to Okmulgee from Keokuk Falls P. O.?

No, sir; nothing more than give an order to get my mail from the P. O.

Have you ever seen this man Thatch dead or alive since he went to Shawnee?

As to seeing him since May 14th, 1895, alive, I have not.

21 Have you seen him dead?

If I have I did not recognize him.

The body that you saw yesterday, is that not the body of Mr. Thatch?

I couldn't say; it might be and it might not be; I don't know.

To your best knowledge is that the body of Mr. Thatch?

The one thing that I could recognize was the blue overalls that I am satisfied he wore off. They may be the ones, and they may not be.

Whose gun is this I show you?

That is my gun, with the exception of $1.80 that I owe on it.

Did you ever burn any bedclothes near Mr. Chisholm's house?

I did; yes, sir.

What did they consist of?

They consisted of some pieces of quilts.

Anything else?

An old pair of pants.

Why did you burn them?

Because they was of no service.

Did you burn any pieces of quilts down at the camp where you and Thatch last camped?

Nothing but an old cloth.

Were there not old pieces of quilts lying around that camp upon which had pieces of blood?

Not that I know of.

I certify that the statements herein made before me on the 27th day of May, 1895, by George W. Wilson are true and correct statements made by him.

Witness my hand this 27th day of May, 1895.

JNO. B. GEORGE,
U. S. Com'r for 3rd Dist., Okla. Ter.

The district attorney offered in evidence a picture purporting to be the picture of Z. W. Thatch, the alleged deceased. The defendant objected to the introduction of this picture, but his objections were by the court overruled, and the defendant at the time excepted. The United States, to further maintain the issues on their part, offered two witnesses who testified that they saw tracks at the place where the dead body was found that resembled the tracks of defendant, and defendant told one of them that he was there, and then took it back and said he was not there but below there on the same creek; one witness testified that
22 he arrested defendant and after he was put in jail, he told defendant that he would go and look for Thatch if it was necessary, and defendant told him not to go, that it was not necessary. There was found in the trunk among the things of Thatch a certificate of deposit for $140.00 in a bank in Springdale, Ark. The evidence further shows that Thatch had 5 horses when he left home to go the Territory—one of the mares brought a colt on the way. After the dead body was found there were five horses found and a colt in the possession of the defendant. Thatch's brother recognized the beard found on the dead body as the beard of his brother. All Thatch's clothing and property that he had was found in possession of defendant, except a pair of overalls. The dead body had on a pair of overalls similar to Thatch's. Thatch's sister recognized the bedticks and the bedclothing as the ones owned by their brother. Thatch was a white man. Some of this bedclothing which Thatch's sisters recognized as that of their brother, defendant said he bought after he *he* said Thatch left him. Defendant told to some persons that Thatch had gone to Shawnee to buy town lots and to others he said he had gone to the Kickapoo opening. Defendant claims that Thatch was his uncle. Thatch's relatives knew of no such relationship. Thatch had never known defendant before defendant was brought to his camp by a boy that had started with Thatch from Springdale, but had concluded to return and was requested to find some one else to go in his place. The boy met defendant in the road and told his mission and defendant said he would go. Thatch

intended to go over certain parts of the Indian Territory and Oklohoma. He was gone about 33 days before the killing occurred. On the day before the day Thatch was supposed to be killed, Thatch went to Keokuk Falls and told the parties there that he had seen enough of the Oklohoma country and was going to Okmulgee in the Creek country, which is east, and directed his mail to be forwarded from Keokuk Falls to Okmulgee, Creek Nation. He went back to the camp that day, which was Wednesday, and about 3 o'clock in the afternoon, he and defendant broke up camp at that place—inquired the road to Okmulgee and went in that
23 direction, having at the time, as two witnesses testified, five horses and one colt, which were in defendant's possession and claimed by him after Thatch's body was found. About five miles from that place they went into camp near a creek, in which the body was afterwards found. Defendant admitted that they camped at that place. They were seen there at dark camping. That night about 10 o'clock two gunshots were heard in that direction. When the body was found it was so badly decomposed that it could not be told whether any bullets had entered the body or not. The head of the dead body was smashed with some blunt instrument. Two witnesses testified that one of the axes found in the possession of the defendant had blood on it. The bedtick which had blood on it had a pillowcase sewed over the blood spots. The other side had a flour sack sewed over the blood. Thatch's sister recognized this pillowcase as one belonging to her brother. Defendant said that pillowcase was sewed on in that way when he bought it after Thatch had gone. When defendant looked at the dead body he said, "Surely, that is my uncle, but I am as innocent of it as any of you." Defendant said Thatch rode away on horseback, but Thatch's saddle was there and the only pair of shoes that Thatch owned was there, and the plates had been taken from the heels of the shoes and similar plates found in possession of the defendant. The dead body had on no shoes, hat, or coat, only an undershirt and overalls and a pair of socks. These socks were said by Thatch's sister to be like the ones that he had taken away with him. The dead body was in the water and had a rock and two logs over it. It was badly decomposed. The witnesses gave it as their opinion from the appearance of the body that it had been dead 12 or 14 days.

Defendant was seen at the camp early next morning near sunrise, and Thatch was not there. Defendant then said that Thatch had gone to Shawnee to buy town lots. When Thatch left home he had no money except about $30.00 in cash and the certificate of deposit for $140.00. After dead body was found defendant was found in possession of
24 about $28.00. Defendant is a white man. The place where the dead body was found is in the Creek Nation, I. T. While on their way to the Indian country defendant wrote a letter for Thatch to a friend in Springdale, Ark., whence Thatch had come.

The defendant, to maintain the issues on his part, offered evidence of several witnesses to show that the blood found on the bedclothes had gotten there from the blood of a prairie chicken which they had killed, and also from the bleeding of sick horses. He offered evidence of three witnesses who testified that they saw Zack W. Thatch in the Ok. Territory several times after the dead body was found. The defendant also testified in his own behalf that he was well acquainted with Z. W.

Thatch and had known him several years. That he left Arkansas with him for the purpose of going to the Oklohoma country. That when he started with Thatch, Thatch had five horses. Thatch got a horse, belonging to him in the Cherokee country. That two of Thatch's horses got sick on the way, and that they bled them. That he bought two of the horses and the wagon from Thatch before he got to Oklohoma, and pay'd him in a note that Thatch had been owing him for about three years. That he and Thatch had worked together in the Creek country three years before then, and while there he had loaned Thatch $80.00 in money and taken his note for it, which note he gave Thatch for the wagon and two horses. That after he was arrested he was taken to Keokuk Falls, where a great crowd of people gathered around him and threatened to mob him, and he was taken before J. B. George, who proceeded to examine him in the presence of the crowd, without giving him the benefit of counsel or warning him of his right of being represented by a counsel, or in any way informing him as to his right to be thus represented.

The court then, among other things, charged the jury as follows:

There are but few things more to be said by the court in this case. You are to bear in mind that there are just two general propositions entering into your verdict, the truth of the case and the principle of the law applicable to that truth. I have given to you the language of the law defining this crime of murder charged in this indictment. Then the question becomes pertinent upon my part to ask you whether or not, in your judgment, the proposition asserted in this indictment has been so proven as under the principles of the law which I will give you in a moment the crime of murder has been established. If that is the truth of the case, then the principle of the law applicable to that truth is that which defines the crime which tells you what is murder. In that way you get at a rational result; in that way you arrive at what is called your true speech, your very dictum—your verdict. That is the way you arrive at it, by finding the truth and applying the law applicable to the truth, and these are the two general propositions which enter into your verdict. Every proclamation which you make here in the shape of a verdict has involved in it and interwoven with it, I say, the law of the case which is applicable to the truth of it as you find it by your judgment and by your consciences. Now, we come to the point where I am to remind you, as I have already, but I remind you again, that your certain duty is to find out what the truth of the case is as ascertained by you from the evidence which has been offered before you. As we so often remark, it is impossible to reproduce actually and really this occurrence, or to reproduce it *is* it would be reproduced upon a stage. It is a drama which can not be presented to a jury in that way. The bloody drama can only be seen by the light of the testimony which illuminates it, which lights it up, so you are able, honest, conscientious, and intelligent men, of judgment and reason and memory, having a desire to arrive at the truth, to see it by the light of these circumstances which are brought here as witnesses and offered before you in this case. Then let us go over again the general propositions necessary to be found. First, you are to find whether the man alleged to have been killed is dead, and in passing upon that you are to take into consider-

ation all of these circumstances surrounding it, and whether he was
26 killed in such a way as to make the crime the crime of murder.
Then when we come to the proposition as to the guilt or innocence of the defendant you are to ascertain whether by the light of this testimony he had the means at hand to produce this deadly result, and secondly, whether he had the opportunity to produce it. Then what are the circumstances in the case pointing to the guilt or innocence of the defendant. All these facts and circumstances you have a right to take into consideration; you have a right to have them all pass in review again and again if necessary when you come to consider the case in your jury room, in order that you may the better see whether guilt or innocence exists here. Every item of testimony is to be considered, not by itself alone, because it may be a very insignificant fact when considered alone, but when considered in conjunction with other facts, when considered as a link going to make up the chain of evidence, it may have great proving power—it may have great weight as a fact in the case. Then it is your duty to see what presumptions you can legitimately draw from the facts and circumstances in this case. The law says that if a man has been killed, and killed in such a way as to show it was done murderously under the law I have given you defining the crime of murder, then you are to look to see whether the party accused of the killing was found in possession of any of the property of the man killed. If so, that is the foundation for a presumption. It is not conclusive in the beginning, but it is a presumption which you are to look at just as you would look at it as reasonable men outside of the jury box. The party so found in possession of such property, recently after the crime, is required to account for it, to show that as far as he was concerned that possession was innocent and was honest. If it is accounted for in that way then it ceases to be the foundation for a presumption. If it is not accounted for in that satisfactory, straightforward, and truthful way that would stamp it as an honest accounting then it is the foundation for a presumption of guilt against the defendant in this case, just upon the same principle if a certain man is charged with robbery or larceny, and is
found in the possession of the property stolen or robbed recently
27 after the crime, he is called upon to explain that possession. If
his explanation of it is truthful; if it is consistent; if it is apparently honest; if it is nor contradictory; if it is the same at all times; if it has the indicia of truth connected with it, that may cause to pass out of the case the consideration of the presumption arising from the possession of the property, but if it is not explained in that way it becomes the foundation of a presumption against the party who is thus found in possession of that property. Now, that is not the only foundation for a presumption, but you take into consideration the very appearance of this property, whether there were blood stains upon it, indicating that there was blood of some kind there; and if so, whether that fact has been satisfactorily explained by the defendant in this case. If not, whether, in your judgment, there is that in these numerous blood stains upon these clothes, bedclothing, and found upon the straw in that bed, whether or not that fact, if it has not been satisfactorily explained, is a fact upon which you may base a presumption that there was an act of deadly vio-

lence perpetrated while the party was upon these bedclothes, or while he was connected with them in such a way as that the blood was the blood of the murdered man or the missing man. Now, another foundation of a presumption is the fact of his false statements. You understand nature, in her bountiful provision by which she has given to man a set of rules by which he may know the truth above all other things, that rule which underlies all nature, and which comes from the same source that this state of nature comes which has its abiding place in the very breast of God himself, because God is truth—the truth. The truth is the same yesterday, to-day, to-morrow, and forever. If a man makes a statement to you to-day about a transaction, which is one thing, and details to you another one to-morrow, which is something else, and another again, which is something else, you necessarily call upon him to explain why he has made these contradictory statements, because you know they are not the attributes of truth; you know they do not belong to the truth, because the highest attribute which it possesses is harmony, its consistency,
28 and it possesses thes' attributes at all times; whether it is spoken in the stillest and smallest voice with which it can be uttered, or whether it is heard in the thunders of the clouds, or in the roar of the waters of the ocean, or in the voice of the mighty earthquake, it is still the voice of truth and the voice of nature, and it speaks the same at all times, and it has always attending it that which stamps it as true. Therefore, if statements in this case before you, which are false, were made by the defendant or upon his side of the case; if they were made by his instigation, and they were knowingly instigated by him, you have a right to take into consideration the falsehoods of the defendant first to see whether they are falsehoods. Then you are to look at them to see whether he satisfactorily explains to you the making of these false statements, and if he does not they are the foundation of a presumption against him for the reasons I have given you, because if they are not in harmony with nature, if they are not in harmony with truth, if they do not speak the voice of truth, then they speak the voice of falsehood; they speak the voice of fraud; they speak the voice of crime, for they are not in harmony with that great law of truth which in all of its parts is consistent and harmonious. Then look at these statements and view them not alone, but in connection with the other circumstances in the case—all the other circumstances which have gone before you as evidence—to see whether or not the conduct which is urged by the Government as accusatory, as inculpatory, has been satisfactorily explained by the defendant upon the theory of his innocence. If so, then that conduct passes away as proving facts in the case. It is no longer the foundation as proving facts for a presumption; but if these explanations are not satisfactory, if they are not in harmony with the truth, the presumption must remain in the case, and you have a right to draw inferences from these circumstances I have named.

In passing upon the credibility of the evidence you consider the relation of the witnesses to the case, their interest in it, not that they may exhibit
29 zeal in hunting up the evidence as to whether a crime had been committed or not, for that is commendable, that is the duty of every citizen, and if all of us performed it under all circumstances as we

ought to, crime would virtually disappear in the country, and when witnesses exhibit zeal, when they exhibit energy, when they exhibit enterprise in gathering up all the circumstances and minutia which surrounds a case, they are entitled to the commendation of all. That does not show an interest which would create any undue bias in the judgment of the law against any man who might testify. If a man is related to the case, however, so as to be affected by the result of it directly or immediately, that is a condition which you are to necessarily look at, because we are all largely creatures of self-interest. If that self-interest is great, if it involves the result which may deprive us of life, it is the greatest which can ever confront us. If that is the condition in passing upon the testimony of such a witness we are to view that evidence in the light of that condition, not that we are to necessarily exclude the testimony because of that condition, but we are to apply this self-evident principle which is applicable to all of us, that when we are so situated we are more apt to testify so as to benefit ourselves than to testify against ourselves, or even to keep along the strict line of truth. We are more apt to wander from that line when there is that condition confronting us than if we are entirely disinterested. Such testimony is to be looked at in the face of that condition, and above all things in the face of the other facts and circumstances. The defendant goes upon the witness stand in this case and you are to view his evidence in the light of his relation to the case, in the way I have named, and in addition thereto you are to look at all the other facts and circumstances in the case as bearing upon his evidence to see whether it contradicts what he says, and therefore weakens it; whether it is so as to be contradictory and inconsistent from statements made by him at other times; whether it is shown to lack these elements of truthfulness known as rationality, known as consistency, known as naturalness. Whether these things are all absent from it, or whether in your judgment it seems to be consistent and probable in itself when you come to look at the story and listen to it and weigh it by your judgment. If it has these attributes they are evidences of its being true. If it hasn't them, but has the opposite, this opposite condition made up of these circumstances is an evidence of its being false.

To the giving of said charge the defendant at the time of its delivery and in the presence of the jury filed the following exceptions:

1st. Defendant excepts to that part of the charge that tells the jury that the possession by the defendant of the property of deceased is a presumption against the defendant, etc., and all remarks of the court on this subject. Also, that defendant must explain the blood stains, etc., on the bedclothes, etc.

2nd. Defendant excepts to that part of the court's charge that tells the jury that the contradictory statements of the defendant, etc., is a presumption against him.

3rd. Defendant excepts to the remarks of the court that tells the jury that they should take into consideration the fals' statements of *th* the defendant.

4th. Defendant excepts to the remarks of the court on the testimony of defendant as a witness in his own behalf, and all remarks pertaining to the same.

To all of which rulings of the court the defendant at the time excepted and tendered this his bill of exceptions, and prayed that the same be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

(Endorsed on back:) Filed 1/24/96. S. Wheeler, clerk, by I. M. Dodge, D. C.

31 ASSIGNMENT OF ERRORS.

United States circuit court, western district of Arkansas.

UNITED STATES }
vs.
GEORGE W. WILSON. }

The defendant, George W. Wilson, files this his assignment of errors committed on the trial of said cause:

1st. It was error to admit in evidence the picture purporting to be the picture of the deceased.

2nd. It was error to admit in evidence the paper purporting to be the statement of the defendant before J. B. George.

3rd. It was error for the court to charge the jury as follows:

"The law says that if a man has been killed, and killed in such a way as to show that it was done murderously, under the law I have given you defining the crime of murder, then you are to look to see whether the part' accused of the killing was found in possession of any of the property of the man killed. If so, that is the foundation for a presumption. It is not conclusive in the beginning, but it is a presumption which you are to look at just as you would look at it as reasonable men outside of the jury box. The party so found in possession of such property recently after the crime is required to account for it, to show that, so far as he was concerned, that possession was innocent and was honest. If it is accounted for in that way, then it ceases to be the foundation for a presumption. If it is not accounted for in that satisfactory, straightforward, and truthful way that would stamp it as an honest accounting, then it is the foundation for a presumption of guilt against the defendant in this case, just upon the same principle if a certain man is charged with robbery or larceny, and is found in the possession of the property stolen or robbed recently after the crime, he
32 is called upon to explain that possession. If his explanation of it is truthful, if it is consistent, if it is apparently honest, if it is not contradictory, if it is the same at all times, if it has the indicia of truth connected with it, that may cause to pass out of the case the consideration of the presumption arising from the possession of the property, but if it is not explained in that way it becomes the foundation of a presumption against the party who is thus found in possession of that property."

4th. It was error for the court to charge the jury as follows:

"Now that is not the only foundation for a presumption, but you take into consideration the very appearance of this property, whether there

were blood stains upon it indicating that there was blood of some kind there, and if so whether that fact has been satisfactorily explained by the defendant in this case. If not, whether in your judgment there is that in these numerous blood stains upon these clothes, bedclothing, and found upon the straw in that bed, whether or not that fact, if it has not been satisfactorily explained, is a fact upon which you may base a presumption that there was an act of deadly violence perpetrated while the party was upon these bedclothes, or while he was connected with them in such a way as that the blood was the blood of the murdered man, or the missing man."

5th. It was error for the court to charge the jury as follows:

"Now another foundation of a presumption if the fact of his false statements. You understand that nature, in her bountiful provisions by which she has given to a man a set of rules by which he may know the truth, above all other things that rule which underlies all nature and which comes from the same source that this state of nature comes, which has its abiding place in the very breast of God himself, because God is truth—the truth. The truth is the same yesterday, to-day, to-morrow, and forever. If a man makes a statement to you to-day about a transaction which is one thing, and details to you another one to-morrow which is something else, and another again which is something else, you necessarily call upon him to explain why he has made these contradictory
33 statements, because you know that they are not the attributes of truth; you know they do not belong to the truth, because the highest attribute which it possesses is its harmony, its consistency, and it possesses these attributes at all times, whether it is spoken in the stillest and smallest voice with which it can be uttered, or whether it is heard in the thunder of the clouds, or in the roar of the waters of the ocean, or in the voice of the mighty earthquake, it is still the voice of the truth and the voice of nature, and it speaks the same at all times, and it has always attending it that which stamps it as true. Therefore, if statements in this case before you which are false were made by the defendant, or upon his side of the case, if they were made by his instigation, and they were knowingly instigated by him, you have a right to take into consideration the falsehoods of the defendant, first to see whether they are falsehoods. Then you are to look at them to see whether he satisfactorily explains to you the making of these false statements, and if he does not they are the foundation of a presumption against him for the reasons I have given you, because if they are not in harmony with nature, if they are not in harmony with truth, if they do not speak the voice of truth, then they speak the voice of falsehood, they speak the voice of fraud, they speak the voice of crime, if they are not in harmony with that great law of truth which is in all of its parts consistent and harmonious. Then, look to the statements and view them not alone, but in connection with the other circumstances in the case; all the other circumstances which have gone before you as evidence, to see whether or not the conduct which is urged by the Government is accusatory, as inculpatory has been satisfactorily explained by the defendant upon the theory of his innocence. If so, then that conduct passes away as proving facts in the case; it is no longer the foundation as proving facts for a presumption, but if these explanations are

not satisfactory, if they are not in harmony with the truth, the presumption must remain in the case, and you have a right to draw inferences from these circumstances I have named."

6th. It was error for the court to charge the jury as follows:

34 "The defendant goes upon the stand in this case, and you are to view his evidence in the light of his relation to the case, in the way I have named, and in addition thereto you are to look at all of the other facts and circumstances in the case bearing upon his evidence to see whether it contradicts what he says, and therefore weakens it; whether it is so as to be contradictory and inconsistent from statements made by him at other times; whether it is shown to lack these elements of truthfulness known as rationality, known as consistency, known as naturalness.

"Whether these things are all absent from it, or whether in your judgment it seems to be consistent and probable in itself when you come to look at the story and listen to it and weigh it by your judgment. If it has these attributes they are evidences of its being true. If it hasn't them, but has the opposite, this opposite condition made up of these circumstances is an evidence of its being false."

Wherefore, the many errors considered, the defendant prays that the judgment and sentence herein against him be reversed and a new trial awarded him.

GEORGE W. WILSON.
By C. J. FREDERICK, *his Atty.*

(Endorsed on back:) Filed 1/24/96. S. Wheeler, clerk. By I. M. Dodge, D. C.

35 PETITION FOR WRIT OF ERROR.

United States of America, western district of Arkansas.

UNITED STATES }
vs.
GEORGE W. WILSON. }

To the Clerk of the Circuit Court of the United States for Western District of Arkansas:

Your petitioner, George W. Wilson, represents that at the November term of the United States circuit court for the western district of Arkansas he was convicted on an indictment charging him with the crime of murder, and that the said court pronounced judgment and sentence of death upon him upon the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court in order that the same

may be there examined, and if error be found, that the judgment and sentence against him therein may be reversed.

GEORGE W. WILSON.
By C. J. FREDERICK, *his Atty.*

(Endorsed on back:) Filed 1/24/96. S. Wheeler, clerk. By I. M. Dodge, D. C.

36 POVERTY AFFIDAVIT.

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
GEORGE W. WILSON.

I, George W. Wilson, the defendant in the above-entitled cause, upon oath state that I am not worth ten dollars over and above my wearing apparel; and that I am not possessed of sufficient means and am actually unable to pay the costs of the appeal taken by me to the Supreme Court of the United States in this cause, and I therefore pray that this appeal be prosecuted in forma pauperis.

GEO. W. WILSON.

Subscribed and sworn to before me this the 24 day of Jan., 1896.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed 1/24/96. S. Wheeler, clerk. By I. M. Dodge, D. C.

37 United States of America, ss:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Western Dist. of Ark., greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States, plaintiff, and Geo. W. Wilson, a manifest error hath happened, to the great damage of the said Geo. W. Wilson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29 day of Janu'y, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.]

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States,
for the Western Dist. of Ark.

By I. M. DODGE, *D. C.*

Allowed by—

Justice of the Supreme Court of the United States.

38 United States of America, ss:

To United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western dist. of Ark., wherein Geo. W. Wilson plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. dist. judge, this 29 day of January, in the year of our Lord one thousand eight hundred and ninety-six.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

I hereby accept service of the within citation, this 30th day of January, 1896.

JAS. F. READ,
U. S. Atty.

39 United States of America, western district of Arkansas.

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true copy of the record and proceedings in the case of U. S. vs. Geo. W. Wilson, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 30 day of January, A. D. 1896.

[SEAL.]

S. WHEELER, *Clerk,*
By I. M. DODGE, *D. C.*

(Indorsed on cover:) Case No. 16174. Term No., 884. George W. Wilson, plaintiff in error, vs. The United States. W. Arkansas. C. C. U. S. Murder case. Filed February 4, 1896.

Office Supreme Court U. S.
FILED
FEB 28 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. WILSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 884.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. WILSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 884.

MOTION TO ADVANCE.

The plaintiff in error was convicted on the 19th day of December last, in the circuit court of the United States for the western district of Arkansas, of the murder of one Zachary W. Thatch, a white man and not an Indian, committed on May 15, 1895, at the Creek Nation, in the Indian country, and sentenced to be hanged.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance the case on the docket, and set it down for hearing on such day as may be convenient to the court.

Notice of this motion has been served on the defendant, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court U. S.
FILED.
APR 13 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. WILSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 884.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE W. WILSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 884.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

It was charged that plaintiff in error, a white man and not an Indian, on the 15th day of May, 1895, at the Creek Nation, in the Indian country, within the western district of Arkansas, murdered one Thatch, a white man and not an Indian. (Rec., p. 12.)

He was found guilty and sentenced to be hanged. (Rec., p. 5.)

There was proof tending to show that said Thatch was dead, that his body was found in a creek in a decomposed state, in May, 1895, and that from the appearance he had been dead about two weeks.

Plaintiff in error and Thatch had been camping together. The body was found near where they had camped two weeks before it was discovered.

Plaintiff in error, when arrested, had in his possession five horses, a wagon, gun, bed clothing, and other property that had belonged to Thatch. The bed clothing was bloody and the blood had passed through parts of the bed, and the bloody parts were a foot or more in diameter.

At this camping place were found charred pieces of cloth and some buttons and some blood on the ground under where there had been a fire.

Plaintiff in error, when arrested, said that his partner, Thatch, had gone away riding one of his horses, intending to go to the Kickapoo opening, and at another time he said to Shawnee to buy town lots; that he left about two weeks before the body was found, and that he had heard nothing from him since he left.

To others he said he had received a letter from Thatch, but he produced no such letter, and denied having made this statement. (Rec., p. 6.)

Two witnesses testified that they saw tracks at the place where the dead body was found that resembled the tracks of plaintiff in error, and after he was put in jail one of the witnesses told him that he would go and look for Thatch, if it was necessary, and plaintiff in error told him not to go—that it was not necessary.

There was found in a trunk among the things of Thatch a certificate of deposit in the name of Thatch for $140 in a bank in Springdale, Ark.

The evidence showed that Thatch had *five* horses when he left home to go to the Territory, and that *five* horses were found in the possession of plaintiff in error. All of Thatch's clothing and property that he had was found in possession of plaintiff in error except a pair of overalls. The dead body had on a pair of overalls similar to those of Thatch.

Thatch's sister recognized the bedticks and the bedclothing as those owned by her brother.

Some of this bedclothing plaintiff in error said he bought after he said Thatch left him.

Plaintiff in error claimed that Thatch was his uncle, but Thatch's relatives knew of no such relationship. Thatch had never known plaintiff in error before he was brought to Thatch's camp by a boy who had started with Thatch from Springdale, but had concluded to return, and was requested to find someone else to go in his place. The boy met plaintiff in error in the road and told his mission, and plaintiff in error said he would go. (Rec., p. 17.)

Thatch left home intending to go over certain parts of the Indian Territory and Oklahoma. He was gone about thirty-three days before the killing occurred. On the day before the day Thatch was supposed to be killed Thatch went to Keokuk Falls and told parties there that he had seen enough of the Oklahoma country and was going to Okmulgee, and directed his mail to be forwarded there.

He went back to the camp that day, which was Wednesday, and about 3 o'clock in the afternoon he and defendant broke up camp at that place, inquired the road to Okmulgee, and went in that direction. About 5 miles from that place they went into camp near a creek, in which the body was afterwards found. They were seen there at dark, camping. That night about 10 o'clock two gunshots were heard in that direction. The bedtick which had blood on it had a pillowcase sewed over the blood spots. The other side had a flour sack sewed over the blood.

Thatch's sister recognized this pillowcase as one belonging to her brother.

Plaintiff in error said that this pillowcase was sewed on in that way when he bought the bedtick after Thatch had gone.

Plaintiff in error said that Thatch rode away on horseback, but Thatch's saddle was there and the only pair of shoes that Thatch owned was there, and the plates had been taken from the heels of the shoes. Similar plates were found in possession of the defendant. The dead body had on no shoes, hat, or coat—only an undershirt and overalls and a pair of socks. The dead body was in the water and had a rock and two logs over it.

Plaintiff in error was seen at the camp about sunrise next morning, and Thatch was not there. He said that Thatch had gone to Shawnee to buy town lots. (Rec., p. 18.)

There was probably never a case of murder made out more conclusively by circumstantial evidence.

There could not be a shadow of doubt as to the guilt of plaintiff in error.

POINTS AND ARGUMENT.

I.

The first assignment of error is as follows:

> It was error to admit in evidence the picture purporting to be the picture of the deceased. (Rec., p. 23.)

It is based on the following exception:

> The district attorney offered in evidence a picture purporting to be the picture of Z. W. Thatch, the alleged deceased. The defendant objected to the introduction of this picture, but his objections were by the court overruled, and the defendant at the time excepted. (Rec., p. 17.)

The ground of objection is not specified. Presumably it was that a photograph was not admissible in evidence.

The law is now well settled that a photograph can be introduced in evidence for the purpose of proving identity, and manifestly that was the object in this case.

Wharton's Crim. Ev., 8th ed., sec. 544.
3 Rice on Evidence, p. 150.
18 Am. & Eng. Enc. Law, p. 424.
Luke v. *Calhoun Co.*, 52 Ala., 115.
Beavers v. *State*, 58 Ind., 530.
Ruloff v. *People*, 45 N. Y., 215.
Cowley v. *People*, 83 N. Y., 464.
Udderzook's Case, 76 Penn. St., 340.
Shaible v. *Ins. Co.*, 9 Phila., 136; aff. 1 Weekly Notes, 369.

II.

The second assignment is as follows:

> It was error to admit in evidence the paper purporting to be the statement of the defendant before J. B. George. (Rec., p. 23.)

This is based on the following:

> The United States, to further maintain the issues on their part, offered to read in evidence written statement purporting to have been made before J. B. George by the defendant, but the defendant objected to the reading of the written statement *on the ground that it was not voluntary*, whereupon J. B. George was introduced and examined by the United States, and testified as follows: (Rec., p. 6.)

The testimony of George appears on pages 6 to 9 of the record.

The plaintiff in error testified:

> That after he was arrested he was taken to Keokuk Falls, where a great crowd of people gathered around him and threatened to mob him, and he was taken before J. B. George, who proceeded to examine him in the presence of the crowd, without giving him the benefit of counsel or warning him of his right of being represented by a counsel or in any way informing him as to his right to be thus represented. (Rec., p. 19.)

Edmons, *recalled in rebuttal*, testified that he wrote down a part of the statement, and that he wrote it correctly as plaintiff in error made it. (Rec., pp. 9, 10.)

> The United States, by the district attorney, then again offered to read in evidence the paper purporting to be the statement of defendant made to J. B. George, but the defendant objected, and his objections were by the court overruled, and the defendant at the time excepted. The paper was then read in evidence to the jury. (Rec., p. 10.)

The statement is in no sense a confession. *It is throughout a denial of guilt.* It contains statements which

are made the basis for contradiction in the trial, and to involve him in inconsistencies.

The only ground of objection was that the statement was not voluntary. (Rec., p. 6.)

The statement was voluntary. He made no objection to answering the questions propounded to him. He was not sworn. The commissioner, George, says: "He just went on and voluntarily made that statement." (Rec., p. 8.)

In answer to the question as to whether "his statement was made freely and voluntarily," he said:

> Yes, sir. I stated the charge to him and went on and asked him these questions and he answered them, and that is what is done. He went on and made these replies to my questions. (Rec., p. 9.)

Although plaintiff in error testified, he did not contradict the commissioner in any particular. *He did not say that his statement was not voluntary.* He said that George examined him "without giving him the benefit of counsel or warning him of his right of being represented by a counsel or in any way informing him as to his right to be thus represented." (Rec., p. 19.)

His testimony was entirely irrelevant to the exception. He does not say that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. He was doubtless very keen to avail himself of this opportunity to try to turn suspicion from himself.

Even if the statement made involved a confession of the crime charged, it would, under the circumstances under which it was given, be admissible. He was not

sworn, and no threat or inducement of any character was held out to him. The only testimony in the case is to the effect that it was made voluntarily. That stands as a fact proven in respect of it, unless the court is going to override it, by a presumption based upon the fact that it was made before a commissioner, and in an investigation of a charge made against the plaintiff in error, and after his arrest and imprisonment, he being in custody and there being threats of mobbing him. The only other considerations that might weigh in aid of this presumption would be the fact that he was not warned that the testimony might be used against him, or was not advised that he need not answer, and did not have the aid of counsel.

Confessions are admissible, even though made while in custody and while a mob is surrounding the building in which the prisoner is confined, if it appear that they were not made under the influence of threats, promises, or fear. (*State* v. *Ingram*, 16 Kan., 14; *Redd* v. *State*, 68 Ala., 492; Roscoe's Crim. Ev., p. 42, n.)

When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding judge. When there is conflicting testimony, the practice is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant. (*Com.* v. *Preece*, 140 Mass., 276.)

In a number of the States it is left to the jury, where there is conflicting evidence as to the voluntariness of

the confession, to determine whether the confession was voluntary or not. (*People* v. *Howes*, 81 Mich., 396; *Thomas* v. *State*, 84 Ga., 618.)

The whole of the charge is not in the record, and there is nothing to show that in this case the question as to whether or not the statement was voluntary was not submitted to and passed upon by the jury.

The fact that the statement was made before an examining magistrate is not such an element as makes it involuntary.

The practice of examining the accused, says Mr. Greenleaf, was familiar to the Roman jurisprudence, and is still continued in Continental Europe.

It was first introduced in England by the statutes of 1 and 2 Phil. and M., c. 13; and 2 and 3 Phil. and M., c. 10. (Greenleaf on Ev., sec. 224 and note.)

These statutes did not provide for any warning to the defendant of any character.

Mr. Greenleaf says that, in these cases, the *manner* of the examination is to be particularly regarded, and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so, in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary. (Greenleaf on Ev., sec. 225.)

In this case there was a simple examination, without any threats, and without plaintiff in error being sworn, and there is nothing whatever, from the manner of the examination, to indicate that his answers were not volun-

tary, and he himself does not undertake, in his testimony, to say that it was not voluntary.

The fact of administering an oath has been the turning point in a great many cases holding that statements made by the accused are inadmissible on the trial, such as:

People v. *Gibbons*, 43 Cal., 557.
State v. *Garvey*, 25 La. An., 191.
People v. *McMahon*, 15 N. Y., 384.
New York v. *Mondon*, 103 N. Y., 214.

A confession is admissible, though it is elicited by questions, whether put to the prisoner by a magistrate, officer, or private person, and the form of the question is immaterial to the admissibility, even though it assumes the prisoner's guilt.

Rex v. *Wild*, 1 Mood. Cr. Cas., 452.
Rex v. *Thornton*, Id., 27.
Gibney's Case, Jebb's Cr. Cas., 15.
Kerr's Case, 8 C. & P., 176.
Arnold's Case, 8 C. & P., 621.
Joy on Confessions, pp. 34–42.
Roscoe's Criminal Ev., p. 51.

It is not necessary to the admissibility of any confession, to whomsoever it may have been made, that it should appear that the person was warned that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient though it should appear that he was not so warned.

Gibney's Case, Jebb's Cr. Cas. 15.
Rex v. *Magill*, cited in McNally's Crown Pleas, 38.
Rex v. *Arnold*, 8 C. & P., 622.
Joy on Confessions, pp. 45–48.

Rice in his work on evidence, volume 3, section 225, states the law to be that testimony elicited before a committing magistrate, from one arrested and accused of the crime, is not competent against him at the trial, unless he is duly cautioned that any statement he may make is liable to be urged against him in his subsequent trial.

He does not draw any distinction as to whether or not the statement is made under oath.

Cases cited by Rice.

The case of *State* v. *Spier* (86 N. C., 600) was based on a statute.

The case of *People* v. *Darr* (61 Cal., 554) has no bearing upon the question.

The case of *Farkas* v. *State* (60 Miss., 847) was where the testimony sought to be introduced had been given under oath.

The cases of *Dickerson* v. *State* (48 Wis., 288), *Rector* v. *Com.* (80 Ky., 468), and *State* v. *Glass* (50 Wis., 218) do not sustain the text.

In the case of *Teachout* v. *People* (41 N. Y., 7), which did not fall strictly within the New York statute, and, therefore, was decided upon general principles, the court held that statements made by the prisoner, under oath, at a coroner's inquest upon the body, are admissible against him upon his trial for the murder, although he knew at the time he was sworn that it was suspected the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him. It is proper, however, to state further that Teachout was informed by the coroner, before he was sworn, that he was not obliged to

testify, unless he chose. But he was sworn in that case, and informed that he could decline to testify, which was more calculated to make him testify against his will than if the questions simply had been propounded to him, as in this case, without his being sworn, even though he received no notice that he was not bound to testify. The oath operated upon the mind to create an obligation to testify, and, therefore, when the oath is administered, to overcome this effect it is necessary to inform the prisoner that he need not testify. Where no oath is administered, and he does not swear that he will tell the truth, the whole truth, and nothing but the truth, the necessity of warning does not exist as in the other case.

As said in *State* v. *Broughton* (7 Ired., 100), "but it is true, that if a prisoner under examination as to his own guilt, be sworn, his statement is not evidence, because the statute, Rev. Stat., ch. 35, sec. 1 (which is taken from that of Phil. and M.), was intended to have the party free to admit or deny his guilt, and the oath deprives him of that freedom—2 Hawk, Pl. 6, ch. 46, sec. 37; Bul. N. P., 242."

The statutes of Philip and Mary referred to do not provide for any examination on oath.

For a discussion of the effect of the duress superinduced by an oath, see *State* v. *Gilman* (51 Me., 215, 219). In this case the court said:

> From a review of the cases to be found in the books, most of which are *nisi prius* decisions, and made without much consideration, it will be found difficult to deduce a *rule* based upon any general

principle. Most of the cases have turned upon the question whether the prisoner was or was not *sworn* when the statement offered in evidence was made. The origin of this rule, so far as it has excluded such testimony, as has already been stated, is based upon statutory provisions. Being without statute in this State, and having no settled judicial rule established by our courts, we are at liberty, or rather required, to settle the question under the provisions of our constitution, and in accordance with general principles.

A free and voluntary confession of guilt, made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly to be presumed that no man would make such a confession against himself if the facts confessed were not true. (2 Russ. on Cr., 824; Gilb. Ev., 123; Lamb's Case, 552.)

The general rule is that all a party has said which is relevant to the question involved is admissible in evidence against him. The exceptions to this rule are where the confessions have been drawn from the prisoner by means of threats or promises, or where it is not voluntary because obtained compulsorily or by improper influence. (*Hendrickson* v. *People*, 6 Seld., 13.)

The true test of admissibility in this class of cases is, was the statement offered in evidence made *voluntarily without compulsion?* If this proposition be answered in the affirmative, then the statement is clearly admissible in principle; but if not *voluntary*, if obtained by any degree of *coercion*, then it must be rejected, as well by the rules of the common law as by positive constitutional provision.

Does it follow that because a statement is made upon oath in a proceeding where the circumstances of

the commission of the crime are being investigated, and the person making such statements is a suspected or accused person, that it must necessarily be involuntarily made? May not a man depose on oath as freely as he may speak when unsworn? And if so, do his statements become any less reliable than when made without the sanction of an oath?

But the argument is that as a witness he is sworn to state "the truth, the whole truth, and nothing but the truth;" and that the impressiveness of obligation, and the solemnity of the occasion, would have a tendency to wring from the party thus situated facts and circumstances which he is not bound to disclose, and therefore can, in no just sense, be said to be voluntary. As a general proposition this may be true, especially if the party is uninformed with regard to his rights. But when he is fully apprised of his rights, and informed that he is under no legal obligation to disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him. He may testify as freely as he may speak.

If it be said that, though a party in such a situation may be under no legal constraint, he may nevertheless feel under a degree of moral compulsion, and from that cause feel impelled to make self-criminative statements, the answer is, that this moral pressure bears with no greater force upon him when on the stand voluntarily than in other situations. A party who finds himself surrounded with circumstances calculated to cast suspicion upon him, will undoubtedly feel the necessity of making explanations. He may be conscious that a failure to explain will tend to strengthen suspicion already

resting upon him. But such considerations have never been deemed good cause for excluding declarations which he may choose voluntarily to make. Under such circumstances, and with a view to divert suspicion from himself, he may make incorrect statements, or, impelled by fear, or in hope of improving his situation, he may confess himself guilty. Still the law holds all such statements or confessions, when made self-moved, and without foreign influence, to be admissible in evidence against him. It may be unfortunate, and be deemed a defect in the law, that while these statements or confessions thus made may be used against him, he is debarred upon trial from making any personal explanation thereof, yet such is the rule which the wisdom of ages has established, and by which we must abide until changed by legislative enactment.

The law protects the party against legal constraint as a witness, and against the influence of those who by their position may be in a situation to influence his conduct, by exciting his hopes or awakening his fears, and thus inducing him to make statements which may not be true, for the purpose of improving his condition. But it no more excludes these voluntary declarations, statements, or confessions which are the result of his own moral convictions, the manifestation of his own free will, than it does his voluntary actions. The acts and declarations of persons guilty of crime generally furnish the key by which their guilt is brought to light. God in his providence has so ordered, that truth will disclose itself by words and actions, despite the most artful practices of the most skillful and practiced dissembler. To ascertain truth we have but carefully to observe the operation of these immutable laws. Falsehood is always inconsistent with truth and can

> seldom be made apparently to coincide with it. Hence the very artifices to which crime frequently resorts to conceal itself become the most efficient means of detection.
>
> The declarations of accused persons are not necessarily *confessions*, but generally, on the other hand, they are denials of guilt, and consist in attempts to explain circumstances calculated to excite suspicion, and those denials are generally volunteered. Shall they, when thus made under oath or otherwise, be excluded from consideration? To do so would be manifestly to close the eyes of the ministers of justice to one of the most effectual means of detecting guilt (pp. 222–225).

In *Com.* v. *Harman* (4 Barr (Pa.) 270), the statement was excluded because it was given under oath, and because the prisoner was told by the magistrate, "If you do not tell the truth, I will commit you." The court said: "The administering of an oath by the magistrate, under such circumstances, was a gross outrage upon the accused; any information drawn by it or subsequently given on its basis, is inadmissible."

III.

The third assignment of error is as follows:

> It was error for the court to charge the jury as follows:
>
> "The law says that if a man has been killed, and killed in such a way as to show that it was done murderously under the law I have given you defining the crime of murder, then you are to look to see whether the party accused of the killing was found in possession of any of the property of the man killed. If so, that is the foundation for a presump-

tion. It is not conclusive in the beginning, but it is a presumption which you are to look at just as you would look at it as reasonable men outside of the jury box. The party so found in possession of such property recently after the crime is required to account for it, to show that, so far as he was concerned, that possession was innocent and was honest. If it is accounted for in that way, then it ceases to be the foundation for a presumption. If it is not accounted for in that satisfactory, straightforward, and truthful way that would stamp it as an honest accounting, then it is the foundation for a presumption of guilt against the defendant in this case, just upon the same principle if a certain man is charged with robbery or larceny, and is found in the possession of the property stolen or robbed recently after the crime, he is called upon to explain that possession. If his explanation of it is truthful, if it is consistent, if it is apparently honest, if it is not contradictory, if it is the same at all times, if it has the indicia of truth connected with it, that may cause to pass out of the case the consideration of the presumption arising from the possession of the property, but if it is not explained in that way it becomes the foundation of a presumption against the party who is thus found in possession of that property." (Rec., p. 23.)

This is based on the following exception:

First. Defendant excepts to that part of the charge that tells the jury that the possession by the defendant of the property of deceased is a presumption against the defendant, etc., and all remarks of the court on this subject. Also, that defendant must explain the blood stains, etc., on the bedcloths, etc. (Rec., p. 22.)

This is a strictly accurate statement of the law.

There is a uniform current of decisions to the effect that possession of the fruits of crime recently after it has been committed affords a strong and reasonable ground for the presumption that the party in whose possession they were found was the real offender unless he can account for such possession, in some way consistently with his innocence.

Wills on Circumstantial Evidence, p. 47.
Roscoe's Crim. Ev., p. 22.
State v. *Brown*, 75 Mo., 317.
State v. *Butterfield*, 75 Mo., 297.
Tucker v. *State*, 57 Ga., 503.
Foster v. *State*, 52 Miss., 695.
Dillon v. *People*, 1 Hun, 670; 4 Thomp. & C. (N. Y.), p. 203.
State v. *Daly*, 37 La. An., 576.
State v. *Kennedy*, 88 Mo., 341.
1 Greenleaf Ev., sec. 34.
East's Criminal Law, 656.
Knickabacker v. *People*, 43 N. Y., 177.
State v. *Furlong*, 19 Me., 225.

The possession of stolen goods recently after their loss may be indicative, not of the offense of larceny simply, but of any more aggravated crime which has been connected with theft.

Wills on Circumstantial Evidence, p. 52.
Rice Crim. Ev., sec. 468.

The same principle has been applied in cases of murder.

Wills on Circumstantial Evidence, p. 53.
Wharton's Crim. Ev., sec. 762.
Burrill Circumstantial Evidence, pp. 457–9.

The ingenuous and satisfactory explanation of circumstances of apparent suspicion always operates powerfully in favor of the accused, and obtains for him more ready credence when the explanation may not be so easily verified. On the other hand, the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain. (Wills on Circumstantial Evidence, p. 57.)

The judge, in the charge above quoted, instructed the jury as to what was a presumption of fact, and did not so charge them as to convey the impression that their discretionary functions ceased, and that they must be controlled absolutely by a presumption of law, based upon the fact of the possession of property of one recently murdered. They were to take the presumption of fact and act upon it, unless it should be rebutted by the evidence or the explanation of the accused.

The charge was in accordance with the principles laid down by Wharton in his work on Criminal Evidence, section 758, in respect to the presumption obtaining in regard to the possession of stolen goods.

IV.

The fourth assignment of error is as follows:

It was error for the court to charge the jury as follows:

"Now that is not the only foundation for a presumption, but you take into consideration the very appearance of this property; whether there were blood stains upon it, indicating that there was blood

> of some kind there, and, if so, whether that fact has been satisfactorily explained by the defendant in this case. If not, whether, in your judgment, there is that in these numerous blood stains upon these clothes, bedclothing, and found upon the straw in that bed—whether or not that fact, if it has not been satisfactorily explained, is a fact upon which you may base a presumption that there was an act of deadly violence perpetrated while the party was upon these bedclothes, or while he was connected with them in such a way as that the blood was the blood of the murdered man or the missing man." (Rec., pp. 23, 24.)

This assignment also is based upon the exception last above set out.

The ground of exception is "that defendant must explain the blood stains, etc., on the bedclothes, etc." (Rec., p. 22.)

The court did not say that the defendant "must explain the blood stains," but that the jury might "take into consideration the very appearance of this property, whether there were blood stains upon it, indicating that there was blood of some kind there; and, if so, whether that fact has been satisfactorily explained by the defendant in this case."

The court did not charge the jury and instruct them that they must draw any presumption in respect of the blood stains, but said that, after taking into consideration the question as to whether there were not blood stains and whether the defendant had satisfactorily explained them, it was for them, in their judgment, to determine that the existence of blood stains not satisfactorily explained was a fact upon which they might base

a presumption that there was an act of deadly violence perpetrated against one while upon or connected with the bedclothing. He did not say that from this there was to be any presumption as to the guilt or innocence of the defendant, but as to whether or not the blood was that of the murdered or missing man.

The substance of the charge was nothing more than that the jury might look to the blood stains as a circumstance in determining whether or not a murder had been committed.

The existence of blood stains on or near a place where violence has been inflicted is always relevant and admissible as proof. (Wharton's Crim. Ev., sec. 778; *Com.* v. *Sturtevant*, 117 Mass., 122.)

V.

The fifth assignment is as follows:

It was error for the court to charge the jury as follows:

"Now another foundation of a presumption is the fact of his false statements. You understand that nature, in her bountiful provisions by which she has given to a man a set of rules by which he may know the truth, above all other things that rule which underlies all nature and which comes from the same source that this state of nature comes, which has its abiding place in the very breast of God Himself, because God is truth—the truth. The truth is the same yesterday, to-day, to-morrow, and forever. If a man makes a statement to you to-day about a transaction which is one thing, and details to you another one to-morrow which is something else, and another again which is something else, you necessarily call upon him to explain why he has made these contra-

dictory statements because you know that they are not the attributes of truth; you know they do not belong to the truth, because the highest attribute which it possesses is its harmony, its consistency, and it possesses these attributes at all times, whether it is spoken in the stillest and smallest voice with which it can be uttered, or whether it is heard in the thunder of the clouds, or in the roar of the waters of the ocean, or in the voice of the mighty earthquake, it is still the voice of the truth and the voice of nature, and it speaks the same at all times, and it has always attending it that which stamps it as true. Therefore, if statements in this case before you which are false were made by the defendant, or upon his side of the case, if they were made by his instigation, and they were knowingly instigated by him, you have a right to take into consideration the falsehoods of the defendant, first to see whether they are falsehoods. Then you are to look at them to see whether he satisfactorily explains to you the making of these false statements, and if he does not they are the foundation of a presumption against him for the reasons I have given you, because if they are not in harmony with nature, if they are not in harmony with truth, if they do not speak the voice of truth, then they speak the voice of falsehood, they speak the voice of fraud, they speak the voice of crime, if they are not in harmony with that great law of truth which is in all of its parts consistent and harmonious. Then look to the statements and view them not alone but in connection with the other circumstances in the case—all the other circumstances which have gone before you as evidence—to see whether or not the conduct which is urged by the Government is accusatory, as inculpatory, has been satisfactorily explained by the defendant upon the theory of his innocence. If so, then that conduct

passes away as proving facts in the case; it is no longer the foundation as proving facts for a presumption, but if these explanations are not satisfactory, if they are not in harmony with the truth, the presumption must remain in the case, and you have a right to draw inferences from these circumstances I have named." (Rec., pp. 24, 25.)

This assignment is based upon the following exceptions:

> Second. Defendant excepts to that part of the court's charge that tells the jury that the contradictory statements of the defendant, etc., is a presumption against him.
>
> Third. Defendant excepts to the remarks of the court that tell the jury that they should take into consideration the false statements of the defendant. (Rec., p. 22.)

The portion of the charge excepted to in this assignment is a mere statement of the approved rules under which it is admissible for the jury to take into consideration false testimony made or instigated by the defendant and the principles upon which the truth of statements are to be tested. They are to be compared with other proven circumstances in the case, and if they can not be reconciled, they are to be of themselves regarded as circumstances tending to show guilt.

VI.

The sixth assignment is as follows:

> It was error for the court to charge the jury as follows:
>
> "The defendant goes upon the stand in this case, and you are to view his evidence in the light of his

relation to the case, in the way I have named, and in addition thereto you are to look at all of the other facts and circumstances in the case bearing upon his evidence to see whether it contradicts what he says, and therefore weakens it; whether it is so as to be contradictory and inconsistent from statements made by him at other times; whether it is shown to lack these elements of truthfulness known as rationality, known as consistency, known as naturalness.

"Whether these things are all absent from it, or whether in your judgment it seems to be consistent and probable in itself when you come to look at the story and listen to it and weigh it by your judgment. If it has these attributes they are evidences of its being true. If it hasn't them, but has the opposite, this opposite condition made up of these circumstances is an evidence of its being false." (Rec., p. 25.)

This assignment is based upon the following exception:

Fourth. Defendant excepts to the remarks of the court on the testimony of defendant as a witness in his own behalf, and all remarks pertaining to the same. (Rec., p. 22.)

There does not appear to be any ground whatever for criticising the portion of the charge set out.

No injustice has been done to plaintiff in error in the trial of this case, and there can be no doubt as to the righteousness of the verdict.

It is therefore insisted on behalf of the Government that the judgment should be affirmed.

J. M. DICKINSON,
Assistant Attorney-General.

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